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CHARLES ELMORE

# Supreme Court of the United States.

OCTOBER TERM, 1929—No. 397.

CHARTER SHIPPING COMPANY, LTD.,

*Petitioner,*

—against—

BOWRING, JONES & TIDY, LTD.,

*Respondent.*

## BRIEF FOR BOWRING, JONES & TIDY, LTD.

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THE COURT PRESS—Law Printers—47 West Street—Bowling Green 2820-1-4

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## *BRIEF FOR BOWRING, JONES & TIDY, LTD.*

### *Opinions Below.*

The opinion of the Circuit Court of Appeals (R. 14-17) is reported in 33 F. (2d) 280. The memorandum opinion of the District Court (R. 11) was not reported.

### *Jurisdiction.*

The decree of the Circuit Court of Appeals was entered June 17, 1929 (R. 32). Petition for certiorari was filed Sept. 14, 1929, and granted Oct. 21, 1929. Jurisdiction is conferred on this Court by Section 347 (a) of Title 28 of the United States Code.

### *Statute Involved.*

The Harter Act, U. S. Compiled Statutes, Sections 8029-8031, Act of Congress approved February 13, 1893, Sections 1 and 2:

> "It shall not be lawful for the manager, agent, master or owner of any vessel transporting mer-

chandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect. (Sec. 1.)

"It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent or manager to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided. (Sec. 2.)"

## *Statement.*

Bowring, Jones & Tidy, Ltd., respondent herein, brought this action in admiralty for recovery of a deposit made to secure the release of cargo from an alleged lien of the vessel owner in general average for damage to the vessel in getting off a strand. Respondent contends its cargo is not liable to contribute in general

average because of the unseaworthiness of the vessel, and the negligent strand.

In order to secure the release of its cargo, the respondent instead of depositing a general average bond, made the usual general average deposit which stands as a bond in place of the released cargo.

In the event that the Court determines that there is no general average liability on the part of the cargo to the vessel, such deposit (in lieu of the cargo) will be released from lien, and delivered to the consignee, Bowring, Jones & Tidy, Ltd. The petitioner (vessel owner) filed exceptions to the libel (R. 10) on the ground that the District Court had no jurisdiction.

The libel prayed writ of foreign attachment which was issued and pursuant thereto the marshal arrested the respondent's vessel, the S. S. "Charterhulme", which vessel was immediately released by the filing of a surety company bond in the sum of $5,750. The vessel owner filed a general appearance (not a special appearance) (R. 15).

The cargo was shipped from American ports to a foreign port, under three bills of lading (containing a general average clause and incorporating the Harter Act and York Antwerp Rules, 1890) which were issued at Savannah and Brunswick, Georgia and Jacksonville, Florida. The title to the cargo passed to the purchaser, the consignee, Bowring, etc., at an American port.

The general average act, under which the Charter Shipping Company claims its right to a lien against the cargo in general average, arose out of a strand in the American port of Jacksonville, Florida, at the commencement of the voyage. Some of the witnesses in regard to the strand and as to whether or not the same was negligent and due to unseaworthiness and lack

of due diligence to make the vessel seaworthy before the commencement of the voyage, are within American jurisdiction (R. 17). Cargo's contention regarding the strand is that it was due to the unseaworthy condition of the vessel and failure of the engines and boilers to function properly and due to the vessel's being out of control, and the failure of the Charter Shipping Company to use due diligence before the voyage.

Certain portions of the vessel had been repaired before the voyage in Newport News by American repairmen who presumably will be witnesses, and was surveyed at Newport News by a surveyor who also will presumably be a witness. Such testimony would seem to be essential to the vessel owner in order to meet the log entries showing the salting of the boilers and leaks in boiler tubes and constant breakdown of engines prior to the voyage and during the voyage (R. 17).

The log entries disclose considerable difficulty in firing and maintaining steam. Coal had been supplied at American ports and the witnesses as to these matters are within the American jurisdiction (R. 17).

The log entries disclose that the Chief Engineer was ill before and during the voyage and removed to hospital on arrival of the vessel in England. Some of the witnesses as to the physical condition of the chief engineer just prior to sailing will presumably be residents of American ports (R. 18).

The respondent was a customer who bought and paid for American goods at an American port and shipped the same under an American bill of lading. Under such circumstances our Admiralty Courts will, it is submitted, pursuant to public policy, encourage foreign trade and the purchase of American goods by foreign customers. Our courts will not turn away foreign

customers seeking protection in respect to American goods purchased in America and shipped from American ports under American contracts of carriage. When foreign customers come to our shores to invest and buy American goods and ship the goods home under an American contract of carriage, such customers should have the protection, it is submitted, of the American bill of lading and Harter Act, as construed by the American Courts. The American Admiralty Court frequently entertains jurisdiction over suits between aliens arising out of collision and other incidents happening on the high seas where no American contract, no American Statute or American goods are involved. Surely the American Admiralty Court will retain jurisdiction of a suit by a foreign customer and buyer of American goods shipped under an American bill of lading incorporating the American Harter Act, when the strand is in American waters.

The bills of lading contain the following clause incorporating the Harter Act:

> "(1) This shipment is subject to all the terms and provisions of, and all the exemptions from liability contained in the Act of Congress of the United States approved on the 13th day of February, 1893, and entitled 'An Act relating to the Navigation of Vessels, etc.' This shipment is subject to the provisions of Sections 4281-4286, inclusive, of the Revised Statutes of the United States."

Even though the Harter Act were not incorporated, it would nevertheless be an implied part of the contract as the shipment was from a port in the United States to a port in a foreign country.

The petitioner argues that the bills of lading are not before the Court because the libel pleaded them by reference (as is customary) and did not quote these lengthy documents *verbatim*. At the proper time, that is upon the trial, the bills of lading will be introduced in evidence. The petitioner does not deny, and it well knows, that its bills of lading contained a general average clause, the Jason Clause, and incorporated the Harter Act and the York Antwerp Rules 1890.

The District Court declined to retain jurisdiction on the ground that "from the authorities it appears that contribution for General Average is to be determined by the law of the port of discharge". Even if so, the American Admiralty has in such cases retained jurisdiction. But, in the instant case, the Harter Act and the American law determine the liability or non-liability of the cargo to contribute in general average. The contract between the parties provides for general average, and the bills of lading control. The bills of lading provide (in the instant case) for adjustment according to the York Antwerp Rules of 1890 and such rules are applied regardless of what the law or custom at the port of destination may be. The bills of lading in the instant case contain a Jason Clause affecting the rights in general average, and such clause will be enforced regardless of law and usage at port of destination.

The petitioner alleged as grounds for its exception to jurisdiction (fols. 29 and 30):

(1) That both parties are British corporations.

The American decisions holding that Admiralty (as distinguished from other courts) will take jurisdiction

as between two foreigners, unless special grounds are shown for declining jurisdiction, are cited in part hereinafter.

(2) That a general average adjustment has been made up in England.

This is not in dispute, the only question being whether or not under the Harter Act, the American law, and the American bills of lading, the Charter Shipping Company was legally entitled (because of the unseaworthiness of the vessel) to collect any general average whatever from the cargo or is entitled to any lien in general average upon the cargo or upon the deposit which was given in lieu thereof when the cargo was released.

The Admiralty Court is asked by respondent to retain jurisdiction because of the convenience of witnesses; because justice requires that the cargo owner have the benefit of the Harter Act and of the construction of the bill of lading and the Harter Act by an American Admiralty Court, and further because Bowring, etc., now holds security (under writ of foreign attachment) which security libellant would lose if the libel be dismissed.

## *The Questions Involved,*

are whether an owner of an unseaworthy vessel may, following a negligent strand at an American port, have any contribution from cargo in general average, and whether the voyage being from American ports to a foreign port, the American law, the Harter Act, and the bills of lading issued in America will determine this right, and whether the American Admiralty Court having secured jurisdiction will retain the same.

## POINT I.

**The vessel owner is not entitled to contribution from cargo in general average in case of negligent strand or unseaworthiness.**

The only general average question in this case is whether or not the cargo is under any general average liability whatever to the vessel.

In *The Irrawaddy*, 171 U. S. 187, this Court held, in construing the Harter Act, that the vessel owner was not entitled to general average contribution from cargo in the event of a negligent strand. Mr. Justice Shiras wrote at page 189:

> "We shall first inquire why it is that, apart from the act in question, the owner of the ship is not entitled to a general average contribution where the loss was occasioned by the fault of the master or crew, and we find the rule is founded on the principle that no one can make a claim for general average contribution, if the danger, to avert which the sacrifice was made, has arisen from the fault of the claimant or of some one for whose acts the claimant has made himself, or is made by law responsible to the co-contributors.
>
> * * * * * * *
>
> "Not only is the ship owner excluded from contribution by way of general average when the loss arises from the ship's fault, but he is legally responsible to the owner of the cargo for loss and damages so occasioned."

And at page 190:

> "Further, it has frequently been decided by this court that in every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the ship owner that the ship is seaworthy at the time of beginning her voyage, * * *"

And at page 194:

> "It is said that it has been decided by the English courts that when, by a contract in the bill of lading, the ship owner is exonerated from liability for loss caused by the fault of the master or crew, he is entitled to share in a general average contribution."

And at page 195:

> "But whatever may be the English rulings as to the effect of contract immunity from negligence as entitling the ship owner to claim in general average, we do not think the cases are parallel. By the English law the parties are left free to contract with each other, and each party can define his rights and limit his liability as he may think fit. Very different is the case where a statute prescribes the extent of liability and exemption."

It would be unjust to deprive the cargo of the advantage of the American rule as opposed to the English rule.

To the same effect are:

*The Goward* (S. D. N. Y., 1924, Ward, *J.*), 1924 American Maritime Cases 1251, 1254;

*Trinidad Shipping Co.* v. *Frame, Alston & Co. et al.*, 88 F. 528, 531;
*Snow* v. *Perkins*, 39 F. 334, 335;
*Hurlbut* v. *Turnure*, 76 F. 587, 589, affd. 81 F. 208, 211 (C. C. A. 2nd Cir.);
*Gardner* v. *Bales Cotton*, 20 F. 529, 534;
*Bowring* v. *Thebaud*, 42 F. 794, 800, affd. 56 F. 520, 522 (C. C. A. 2nd Cir.).

## POINT II.

### The American contract (bill of lading) controls the right to general average contribution.

Though general average does arise independently of the contract of carriage, nevertheless it will be controlled by the contract clauses such as the clause incorporating the Harter Act, the Jason Clause and the clause providing for the York Antwerp Rules of 1890. These clauses will be applied regardless of the law and custom of the port of destination. The law of destination is ousted by the contract clauses to the contrary.

In *The Jason*, 225 U. S. 32, the bill of lading general average clause was in consonance with the Harter Act. This Court said at page 55:

> "since the clause contained in the bills of lading of the Jason's cargo admits the shipowner to share in the general average only under circumstances where by the act he is relieved from responsibility, the provision in question is valid, and entitles him to contribution under the circumstances stated."

and at page 56:

> "Having already held that the general average clause contained in the bill of lading is valid as against the cargo-owner, it follows *ex necessitate* that it is valid in his favor."

The petitioner contends that the Jason Clause determines only one small aspect of general average. But that one small aspect is whether cargo is liable or is not liable, to the ship, in general average; and that is the only substantive question in this case. There is no general average question of any complicated nature, nor one requiring the testimony of any English barrister.

Judge Ward in *The Goward,* 1924 American Maritime Cases, 1251 (at p. 1253), said:

> "Exceptions in a charter party or bill of lading do not apply to it unless they are expressly stated to do so. This was the view taken by the English courts in *Schmidt* v. *Royal Mail Steamship Company,* * * *. But in later cases, the English courts held that if the charter party or bill of lading relieves a party from liability for negligence, his negligence cannot be considered a fault in general average proceedings * * *.
>
> "I think that the law of this country is like that of the earlier English cases. A shipowner whose negligence has contributed to a distress which caused the sacrifice or expenditure for the common benefit, can recover no contribution in general average from the cargo, *The Irrawaddy,* 171 U. S. 187, unless the right to recover is expressly reserved in the charter party or bill of lading. *The Jason,* 225 U. S. 32."
>
> * * * * * * *
>
> "If the distress of the schooner was not due

to extraordinary weather, but to her inability to withstand weather ordinarily to be expected, her owner must bear the consequent loss, *Benner Line* v. *Pendleton,* 217 Fed. 497. The burden lies upon him to show that she was seaworthy when the voyage began, *The Edwin I. Morrison,* 153 U. S. 199, or that he was protected by the Harter Act, or by an exception reserving the right to contribution, and that he had exercised due care to make her seaworthy or that her unseaworthiness was not discoverable by due diligence, *The Jason,* 225 U. S. 32."

In that case the particular charter party under construction contained no clause affecting general average.

At page 9 of its brief, petitioner cites *The Roanoke,* 59 F. 161,—quite an old case decided at the time that bills of lading were simple documents consisting of little else than a receipt and of course not incorporating the Harter Act or other clauses effecting liability in General Average.

In the cases cited by petitioner at page 10 of its brief, to wit the *Sturgis, Donaldson, Hobson, Barnard* and the *Northern No. 30,* cases, there was no contract clause to guide or determine the question of general average liability and these cases were therefore properly decided independently of the contract. But those cases are not in point, inasmuch as there are relevant clauses in the bill of lading in the instant case and especially the clause incorporating the Harter Act, the Jason Clause and the York Antwerp Rules of 1890.

Petitioner cites Coe on General Average, who said at page 60:

> "It is immaterial where the adjustment is made."

This is true and many a foreign adjustment is made in the United States pursuant to court order and voluntarily by the general average adjuster. Of course such adjustments are made according to the law and custom of the place where cargo and vessel parted company except where the bill of lading or charter party otherwise provides; then, the contract provisions are properly applied by the general average adjusters regardless of the law or custom of the foreign port to the contrary.

Petitioner cites Congdon on General Average, 2d Ed., who said at page 148:

> "the adjustment of a general average loss occurring on the voyage is usually made at that port (destination), although not necessarily so, except that wherever it is drawn up, it must *apart from a valid agreement to the contrary,* be in accordance with the law, customs and usages of the port of destination, and York Antwerp Rules *when the latter are provided for in the contract of affreightment.*" (Italics ours.)
>
> * * * * * * *
>
> "Where the voyage is broken up at a port of refuge and a severance of interests occurs there, the adjustment, *in the absence of agreement to the contrary,* should be made in accordance with the law, customs, and usages at such port." (Italics ours.)

In the instant case the bill of lading, which was the agreement of affreightment, did make provision. The bill of lading incorporated The Harter Act, as well as the Jason Clause and the York Antwerp Rules of 1890. The bill of lading was issued at an American port cover-

ing cargo which had been purchased by respondent in America.

At page 11 petitioner cites Judge Holt's decision in *Monsen* v. *Amsinck,* 166 F. 817, but in the first portion of his decision, Judge Holt had based his decision on the construction of the American contract (the charter party), according to American law.

The average may be adjusted at the port of destination or may be adjusted elsewhere, but must be adjusted according to the law and usage at the port of destination *except* where the bill of lading or contract contains specific provisions. Then the provisions of the contract must be applied, any law or custom of the port of destination to the contrary, notwithstanding. It is not disputed that in the present case, wherever the adjustment might have been made, it would have been prepared according to the custom at the port where the cargo and vessel separated, in all matters of detail, except that the adjustment must be prepared according to the York-Antwerp Rules of 1890 inasmuch as the contract so provides, and *the question of liability or non-liability of cargo in general average must be determined under the Harter Act and the Jason Clause because the contract so provides and because the shipment was from a port in the United States to a foreign port.*

At page 11 of its brief petitioner contends that liability in general average is determined by the law of the port of destination even though this differs from the American law and petitioner cites cases supposedly in support of that contention. But in none of those cases was the question of liability under the Harter Act (either incorporated or unincorporated in the bill

of lading) involved. In the *Hobson* and *Barnard* cases no bills of ladings were involved. In the case of *Compagnie Francaise* v. *Bonnasse,* 15 F. (2nd) 202, a general average bond had been furnished. Both of the litigants were French, and motion to dismiss for lack of jurisdiction was made upon this ground. Judge A. N. Hand denied the motion. In *Minor* v. *Commercial Union Assur. Co.,* 58 F. 801, the Court construed the provisions relating to general average in the contract of insurance.

In *The National Board of Marine Underwriters* v. *Melchers,* 45 F. 643, cited by petitioner, the American admiralty retained jurisdiction.

In *Olivari* v. *Thames & Mersey Marine Ins. Co.,* 37 F. 894, both parties were foreigners. The voyage was broken up at Bermuda. Nevertheless the general average adjustment was stated at New York and Judge Benedict did not decline to retain jurisdiction.

In *International Nav. Co.* v. *Sea Insur. Co.,* 129 F. 13, the construction of the provisions relating to general average in the contract was involved.

## POINT III.

**The bill of lading is an American contract and should be construed according to American law.**

*Liverpool, etc.* v. *Phoenix Insurance Company,* 129 U. S. 397, 447, 448, 453, 461;

*Yone Suzuki* v. *Central Argentine Ry.* (C. C. A. 2nd Cir. 1928) 27 F. (2nd Ser.) 795, 800;

*The Majestic,* 60 F. 624, 627.

The petitioner suggests it may take the testimony of an English barrister—for what purpose is not clear. But if the suit were remitted to a country other than America, respondent would have to prove the American Law as to liability or nonliability of the cargo in general average, under the facts of this case.

## POINT IV.

**Admiralty (as distinguished from other courts) will take jurisdiction of actions between foreigners, unless special grounds appear for denying it.**

In *The Belgenland,* 114 U. S. 355, at page 363, Mr. Justice Bradley wrote:

> "For circumstances often exist which render it inexpedient for the court to take jurisdiction of controversies between foreigners *in cases not arising in the country of the forum;* as, where they are governed by the laws of the country to which the parties belong, and there is no difficulty in a resort to its courts; or where they have agreed to resort to no other tribunals." (Italics ours.)

And at page 365:

> "But, although the courts will use a discretion about assuming jurisdiction of controversies between foreigners in cases arising beyond the territorial jurisdiction of the country to which the courts belong, yet where such controversies are *commune juris,* that is, where they arise under the common law of nations, *special grounds should appear to induce the court to deny its aid*

> *to a foreign suitor when it has jurisdiction of the ship or party charged.* The existence of jurisdiction in all such cases is beyond dispute; the only question will be, where it is expedient to exercise it." (Italics ours.)

In the instant case, American goods were shipped from American ports, the bills of lading were issued in America, the strand occurred in an American port, and jurisdiction was had by the attachment in an American port of a vessel owned by petitioner.

In *The Maggie Hammond,* 9 Wall. 435, this Court said at page 451, by Mr. Justice Clifford:

> "Where the lien is given by the maritime law the question in such a case, in the admiralty courts of the United States, is not one of jurisdiction but of comity, as the jurisdiction to enforce a maritime lien for the breach of a contract of affreightment, either original or appellate, is, beyond controversy, conferred on all the Federal courts by the Judiciary Act."

Suitors in admiralty should not be compelled to resort to the home of the defendant, nor should they be prevented from suing in any District in which his goods or credits may be attached.

In the *Louisville Underwriters Case,* 134 U. S. 488, 493, Mr. Justice Gray said:

> "To compel suitors in admiralty (when the ship is abroad and cannot be reached by a libel *in rem*) to resort to the home of the defendant, and to prevent them from suing him in any district in which he might be served with a summons

> *or his goods or credits attached,* would not only often put them to great delay, inconvenience and expense, but would in many cases amount to a denial of justice." (Italics ours.)

The respondent now holds security (the attachment bond), in America, which security will be lost if the libel be dismissed.

The S. S. "Charterhague" had not returned to an American port, after the voyage in suit, so that libel was filed in the District of New York, where a sister ship, the "Charterhulme", was found and attached. In fact, after the libel was filed, the "Charterhague" made only one voyage to Gulf ports. She also made a voyage to the port of New York, where petitioner could have taken the testimony of her officers, but did not see fit to do so. Since the voyage in suit, the "Charterhague" has either been laid up in ports other than English, or tramping in various parts of the world.

The same rule was followed in *Fairgrieve* v. *Marine Insurance Company,* 94 F. 686, 687 (C. C. A. 8th Cir.):

> "The objection to the jurisdiction of the district court is not tenable. Though the appellee is a foreign insurance company, its policy was issued at Chicago, in the State of Illinois, and no law of comity is violated by litigating any rights claimed under or growing out of the policy in the courts of the country where it was issued and by whose laws its validity must be determined. It is the settled law of this country that our Admiralty Courts have jurisdiction over suits between foreigners, if the subject matter of the controversy is of a maritime nature, and the ship

> or party to be charged is within the jurisdiction of the court. It is a jurisdiction the court may decline to exercise where, for some special reason, it appears to be inexpedient to exercise it, but there is no fact disclosed by this record that would justify the district court in declining to take jurisdiction of this case. 2 Pars. Mar. Law, 543; *Taylor* v. *Carryl*, 20 How. 611; *The Belgenland*, 114 U. S. 355, 5 Sup. Ct. 860; *Enos* v. *Sowle*, 2 Hawaii 332; *Warren* v. *The Benjamin Rush*, Id. 478."

In the *Attualita*, 238 F. 909, the C. C. A. 4th Circuit *per curiam* said:

> "It is said that in the exercise of a sound discretion jurisdiction should be declined. The ship flies a foreign flag. The libellant is a subject of another foreign monarch. The tort complained of was committed upon the high seas. We think this contention foreclosed by what the Supreme Court said in the Belgenland."

Judge Learned Hand in the case of *Aktieselskabet Korn-og Foderstof Kompagniet* v. *Rederiaktiebolaget Atlanten*, 232 F. 403, considered a libel in admiralty to recover damages for breach of charter party against the owner of the ship. The charter party was made in Denmark between Swedish and Danish corporations. The owner pleaded that this Court should not take jurisdiction of the cause on the ground that it was between two foreign corporations, but the Court took jurisdiction.

In the case of *Marine Insurance Company* v. *Elder Dempster & Company*, in which both the parties were

British corporations (decided January 1, 1922 but unreported) Judge Knox said:

> "As between the parties to this suit the convenience of one as to witnesses, etc., appears to be about as broad as that of the other is long. It is all too true that this Court is burdened with litigation to such a degree that justice moves with a leaden heel. Nevertheless, this Court is open to such litigants who may, under the law, and who desire to come here, and one case more or less upon our calendars is of little consequence. If the parties can stand the necessary delay this Court can do likewise. This suit's remaining here is within the Court's discretion, and I rather like the idea that we will exercise jurisdiction whenever we may properly do so."

In *Danielsen* v. *Entre Rios Rys. Co.*, 22 F. (2nd Ser.) 326, the Court said at page 327:

> "It is clear that whether an admiralty court will take jurisdiction of suits between foreigners is a matter entirely within its discretion, and such suits will be entertained, unless some special reason is shown why the court should deny its aid."

In *The Kaiser Wilhelm Der Grosse,* 175 F. 215, at page 216, Judge Hough said:

> "To decline jurisdiction of this cause would, I think, be a departure from the long-established practice of all admiralty tribunals in the United States. Almost the sole purpose of declining jurisdiction is to avoid the transaction of unnecessary business. If there be an additional reason, it is to be found in treaty obligations, which do not affect this cause. *Seizure* (or its legal equivalent)

> *of these vessels was effected within the territorial jurisdiction of this court, and all parties have appeared generally.*" (Italics ours.)

It will be recalled that in the instant case the S. S. "Charterhulme" was seized within the District of New York, and the appearance of the petitioner was general and not special. Thereby petitioner voluntarily submitted to the jurisdiction of the American Court (Benedict's Admiralty, 4th Ed., Sec. 383).

The suer, and not the sued, has the choice of forum. Judge Benedict, author of Benedict's Admiralty, in the case of *Chubb* v. *Hamburg Co.*, 39 F. 431, said:

> "The general rule is that, where there is a choice of forum, the libellant has the right of choice. To grant the defendant's application in this case would be to give to the defendant the right of choice."

## POINT V.

### Justice requires that the American Admiralty Court should retain jurisdiction of this cause.

The construction put upon the Harter Act by the English Courts in general average is quite different from the construction placed upon the same by the American Courts.

Lowndes on General Average (1922), pp. 32 *et seq.*;

Congdon on General Average (1923), pp. 29 *et seq.*

Furthermore the appellant if turned away from our courts would not only lose the benefit of the security which it now holds, and the benefit of the construction by the American Court of the American bill of lading and the American Harter Act, but would lose the advantage also of the liberal procedure of an Admiralty Court, as the English Admiralty Court has no jurisdiction.

Maclachlin's Law of Merchant Shipping, 6th Edition (1923), p. 559;
Lowndes on General Average, 6th Edition (1922), pp. 412-417;
Pritchard's Admiralty Digest, p. 41.

Again the rule in England as to burden of proof of unseaworthiness and the exercise of due diligence, is different from the rule in the American courts.

## POINT VI.

### An American Admiralty Court will take jurisdiction of a general average case involving adjustment according to law and usage of a foreign port.

Although respondent does not ask that a General Average Adjustment be stated or examined but merely that this Court determine whether or not cargo was liable at all in general average, nevertheless the following cases may be of interest.

In *National Board of Marine Underwriters* v. *Melchers*, 45 F. 643, the voyage was from Hamburg to New York, but was abandoned at Fayal where the ship and cargo parted company. Suit was brought by

cargo in New York for contribution due it in general average and another foreign vessel of the same ownership was arrested by writ of foreign attachment. The Court held that it had jurisdiction and in finding that the cargo and vessel parted company at Fayal, said:

> "It follows that the rights of the parties are to be determined by the rules prevailing at Fayal * * *."

The Court ordered the adjustment to be made here according to the customs and law at Fayal.

General Average Adjustments are frequently made in America according to the law and usage of the foreign port at destination.

In *The Goward,* 1924 American Maritime Cases 1251, the voyage was from New York to the Azores and Bermuda. Judge Ward held that there was no liability in general average because of the unseaworthiness of the vessel.

But, as has already been mentioned, the General Average Adjustment is not in question in this suit, but merely the question as to whether there was any liability whatever on the part of the cargo to the ship.

## POINT VII.

**The Circuit Court of Appeals properly reviewed and reversed the discretion exercised by the District Court.**

*The Belgenland*, 114 U. S. 355, 368;
*Heredia* v. *Davies*, 12 F. (2nd Ser.) 500, 501.

By reviewing and reversing the lower Court, the Circuit Court of Appeals did not criticize or condemn the lower Court.

## *LAST POINT.*

***The decision of the Circuit Court of Appeals should be affirmed, with costs.***

Respectfully submitted,

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*Counsel.*

New York, March, 1930.